

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT C. KARRICK
Claimant

VS.

WICHITA EAGLE & BEACON
Respondent

AND

**TRAVELERS PROPERTY CASUALTY CO.)
OF AMERICA
Insurance Carrier**

Docket Nos. 265,023
1,023,432

ORDER

Claimant requested review of the August 29, 2006 Order by Administrative Law Judge (ALJ) John D. Clark.

APPEARANCES

David H. Farris, of Wichita, Kansas, represents the claimant. Lyndon W. Vix, of Wichita, Kansas, represents the respondent and its insurance carrier (respondent).

ISSUES

The Administrative Law Judge (ALJ) was asked to determine which of claimant's two accidents that arose out of and in the course of claimant's employment with respondent caused the need for a right knee replacement. Following a hearing, the ALJ concluded claimant's right knee replacement was attributable to the earlier May 1, 1998 accident, a claim that had been reduced to an Award under Docket No. 265,023, and thus, claimant

was granted post-award benefits.¹ Although not specifically stated, by implication, the ALJ denied claimant's contention that his need for medical treatment was causally connected to his subsequent claim filed under Docket No. 1,023,432, a claim which has yet to be fully litigated and is only at the preliminary hearing stage.

Claimant requests that the Board reverse the ALJ's decision and find that his need for a knee replacement is related to his most recent accident of May 19, 2005 and each and every working day through April 10, 2006 under Docket No. 1,023,432. Such an order would effectively increase the weekly temporary total disability (TTD) rate for the period claimant was off work due to the surgery. Claimant contends the respondent's decision to pay benefits under the earlier docketed claim (and at a correspondingly lower weekly rate) is arbitrary and "a deliberate method to substantially reduce the amount the claimant would receive in temporary total disability benefits, and in addition, significantly limit his recovery under review and modification."²

Respondent initially contends that the Board does not have jurisdiction over this appeal because the dispute at issue does not involve compensability. Respondent states it has provided medical and TTD benefits as requested although at a weekly rate less than claimant desires. Thus, there is no jurisdictional issue to be determined. And that even if jurisdiction is appropriate the ALJ's Order should be affirmed. Claimant has had a long history of right knee problems and because claimant had previously been advised of the need for knee replacement surgery in connection with his 1998 injury, the ALJ was within his jurisdiction to conclude that claimant's most recent procedure was attributable to the 1998 event rather than the claimant's most recently filed claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs the undersigned Board Member makes the following findings of fact and conclusions of law:

This dispute presents itself in a rather unusual procedural context. Claimant has filed three separate claims against this respondent, although only two of the claims are involved in this appeal. The first accident occurred May 1, 1998 and is filed under Docket No. 265,023. That claim was reduced to an Award on August 5, 2003 and awarded the claimant a 20 percent impairment to his right knee along with the rights to future medical benefits and to review and modification being left open.

¹ Claimant underwent surgery on May 10, 2006 and was paid temporary total disability benefits (ttd), albeit at the 1998 rate rather than the higher 2006 rate. It appears claimant was merely seeking a determination of the appropriate accident date for purposes of increasing the amount of ttd owed and ensuring that any permanency will be assigned to the newer claim.

² Claimant's Brief at 6-7 (filed Sept. 25, 2006).

On January 24, 2001, claimant sustained another injury to the same knee, and another claim was filed.³ During the course of that claim, claimant was evaluated by both Drs. Murati and Munhall. Dr. Murati's notes indicate that claimant had been seen by Dr. Eyster and advised that a total knee replacement was necessary but to wait as long as possible.⁴ Dr. Munhall's 2002 report indicates that claimant "might well require future right total knee replacement reflecting natural consequences of his previous right knee injuries and surgical interventions."⁵ Claimant testified that he recalled both Dr. Eyster and Dr. Munhall telling him that he would most likely need a knee replacement.⁶

Thereafter, claimant filed another claim for a series of injuries commencing May 19, 2005 and ending on April 10, 2006, under Docket No. 1,023,432. This claim stems from an acute injury on May 19, 2005 but because claimant continued to work his normal duties, including double shifts, he has pled this as a series of repetitive injuries.⁷

On May 10, 2006, claimant had partial right knee replacement surgery. Claimant acknowledges that respondent has provided medical and TTD benefits in connection with this procedure. However, claimant took issue with respondent's decision to provide those benefits based upon the belief that the procedure was due to the 1998 accidental injury rather than the 2006 accident, the difference being the rate of TTD benefits and the method of calculating the ultimate compensation due. That dispute led to both a preliminary hearing (in Docket No. 1,023,432) and a post-award hearing (in Docket No. 265,023).

The claims were consolidated for purposes of that hearing, and medical records were offered into evidence without any depositions. This is the procedure contemplated in preliminary hearings. Claimant initially objected to the admission of two of respondent's exhibits (based upon delayed disclosure), but claimant's counsel ultimately conceded he had no objection "for purposes of preliminary hearing".⁸ Thus, all of the offered exhibits were entered into evidence. At the hearing claimant contended his right knee replacement procedure was attributable to his 2005/2006 accident and not the 1998 accident. In support of this belief, claimant offered the report of Dr. Munhall, a physician who had seen claimant before the most recent accident. Dr. Munhall indicated in a written report dated

³ That claim is Docket No, 265,025 and is not the subject of this consolidated matter.

⁴ P.H. Trans. (Aug. 29, 2006), Resp. Ex. 1 at 2 (Dr. Murati's Apr. 24, 2002 IME report).

⁵ *Id.*, Resp. Ex. 2 at 5 (Dr. Munhall's Oct. 14, 2002 report).

⁶ *Id.* at 19-20.

⁷ E-1 Application for Hearing dated Apr. 12, 2001.

⁸ P.H. Trans. (Aug. 29, 2006) at 4.

May 15, 2006 that the claimant had stable chronic right knee pain until his acute injury on May 19, 2005. And in his opinion, the May 2005 injury led to a sustained progressive aggravation and acceleration of an underlying right knee osteoarthritis that required orthopaedic surgery with right knee arthroplasty.⁹

Respondent countered with the reports authored by Drs. Prohaska and Pappademos, who indicated that claimant's need for the arthroplasty is a natural and probable consequence of his prior injuries.¹⁰ Dr. Pappademos indicated that claimant had significant medial compartment osteoarthritis and he did not believe this was a result of a knee strain diagnosed by Dr. Prohaska in May 2005.¹¹

The first issue that must be addressed is whether the Board has jurisdiction to consider any or all of the matters brought forward in this appeal. Not every preliminary hearing Order is appealable to the Board. K.S.A. 44-534a and K.S.A. 44-551 restrict a party's right to appeal from a preliminary hearing to situations where it is alleged that the administrative law judge exceeded his or her jurisdiction in granting or denying the benefits allowed or when certain threshold issues are the subject of the preliminary decision. Those threshold issues include "whether an employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply."¹²

There is no allegation that the ALJ exceeded his jurisdiction. Therefore, the Board is authorized to consider this appeal from a preliminary hearing only if one of the four issues listed above are in dispute.

The difficulty here is that the parties consolidated both claims - one for preliminary hearing relief and the other for post-award benefits - for purposes of determining what is essentially a date of accident issue and a resulting TTD issue. Taking the parties' conduct overall, it appears as if the parties intended to proceed as if this were a preliminary hearing matter. That said, this Board Member finds that there is no jurisdiction to hear this matter and the claimant's appeal is, therefore, dismissed.

AWARD

WHEREFORE, it is the finding, decision and order of this member of the Board that the Order of Administrative Law Judge John D. Clark dated August 29, 2006, is dismissed.

⁹ *Id.*, Cl. Ex. 1 at 4 (Dr. Munhall's May 15, 2006 IME report).

¹⁰ *Id.*, Resp. Exs. 3 and 4.

¹¹ *Id.*, Resp. Ex. 4.

¹² K.S.A. 44-534a

IT IS SO ORDERED.

Dated this _____ day of November, 2006.

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Lyndon W. Vix, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge